Omitted easements in the Torrens system: Devising a better strategy

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The law on omitted easements as an exception to indefeasibility is in a mess. With jurisdictional differences all too evident, and the parties often overwhelmed by the cost of litigation, law and community expectation are unaligned. This article seeks to connect the practice with the law and to argue in favour of a wide and expansive view as to when the exception applies. The approach suggested consists of a wide exception for omitted easements to indefeasibility together with a 'conclusive evidence' provision in the legislation that the recording of the easement on the dominant tenement establishes the existence of that easement. This approach is supported by history, authority, and by reference to the underlying integrity of the land administration system.

Introduction

Described as complex, unsatisfactory, and potentially masking traps for unwary purchasers,[1] the law relating to the regulation of omitted easements as an exception to indefeasibility in Australia is in a mess. And it needs to be fixed. To have decisions which depend on the border in which one resides, and to be reliant on archaic legislative provisions undermine any certainty that can be given by lawyers to clients, and force parties to litigate for years to resolve disputes. The current approach is unwarranted, expensive, and arguably serving only the commercial interests of the engaged lawyers. Also, the results that come from easement litigation are often seen as unjust. To have situations where a neighbour has used a route over another's land for decades without disputation, and suddenly find that they are blocked from using that way can seem, and have been seen as highly unsatisfactory.[2]

What we have seen recently in the jurisdictions of Tasmania and New South Wales is extensive litigation concerning something as simple as a right of access. Obviously, in a utopian vision of the Torrens register, the register would have all interests that pertain to that parcel noted on the title. That, of course, does not happen. It never will, and certain interests will always, and have always been exempt from the operation of indefeasibility. Omitted easements are one of those exceptions. What we need is something that connects the law with the social practice, because we know that when the two are in conflict, the law will take priority.[3] But it is the unpredictability of the legal outcomes that necessitates a method that seeks to connect the doctrinal principles with what occurs on the ground, with this married to an objective

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1 Peter Butt, 'Conveyancing and Property' (2017) 91 *Australian Law Journal* 401, 406.

2 Eg, see the facts of *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274; *Clarence City Council v Howlin* (2016) 219 LGERA 226 ('*Howlin*').

3 See John A Humbach, 'Property as Prophesy: Legal Realism and the Indeterminacy of Ownership' (2017) 49 *Case Western Reserve Journal of International Law* 211, 212.

understanding of what reasonable people would expect. Our legal system is enhanced when outcomes meet community expectations. 'Law, being a practical thing, must found itself on actual forces.'[4]

What has occurred in Australia, a nation of independent states, as regards land administration has been the evolution of the omitted easements exceptions in a way that is jurisdictionally idiosyncratic, ad hoc, and iterative to problems as they were encountered. This development, understandable given the localised nature of the dispute and the response, undermines any search for a holistic overview of the one common law that is supposedly the private law of Australia.[5] It also undermines the practical forces that have given rise to the use of easements, particularly for access. In essence, it reflects competing forces. On the one hand, there is the private right to exclude others from one's land.[6] On the other, the law that wants to see land being productively used — land for which there is no access because no easement exists — fails to achieve this.[7]

In this article, the approaches of the jurisdictions are outlined as to how they respond to the problem of omitted easements. New South Wales is closely examined against the lens of the arguably unsatisfactory decision of the High Court in *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd*.[8] By contrast to New South Wales, Tasmania will then be considered, with its exception more widely drawn than in New South Wales, but which was also shown to inadequately respond or deal with the decade-long litigation that led to *Clarence City Council v Howlin*.[9] As Pearce J lamented in the latter case:

> I cannot conclude my reasons without making one brief but, I think, important final observation. Protracted litigation has generated much expense, delay and ill-feeling. It has continued for more than a decade. This is not the time for attribution of fault ... I would have thought that with goodwill, an open mind, realistic expectations and the willingness to make reasonable concession or compromise, resolution of the outstanding areas of disagreement can and should be reached.[10]

There will also be a brief reference to the jurisdictions of the other states and territories, thematically drawn to highlight how the legislation is drafted and has been interpreted. What will be argued is that the suggestions of the Victorian Law Reform Commission proposals of 2010[11] present an approach

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4 Oliver Wendell Holmes, Jr, *The Common Law* (Little Brown, 1881) 206, 213.

5 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135].

6 This of course seen in the common law world as very much prized: '[It is] one of the most essential sticks in the bundle of rights that are commonly characterized as property': *Kaiser Aetna v United States*, 444 US 164, 176 (1979). See also Jonathan Klick and Gideon Parchomovsky, 'The Value of the Right to Exclude: An Empirical Assessment' (2016) 165 *University of Pennsylvania Law Review* 917 <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2638&context=faculty_scholarship>.

7 See generally the article by Kenneth A Stahl, 'The Trespass/Nuisance Divide and the Law of the Easements' (2017) *George Washington Law Review* (forthcoming) <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3054700_code817953.pdf?abstractid=3054700&mirid=1&type=2>.

8 (2013) 247 CLR 149 ('*Castle Constructions*').

9 (2016) 219 LGERA 226.

10 Ibid 267 [137].

11 Victorian Law Reform Commission, *Easements and Covenants*, Final Report No 22, 14 [24].

which should be commended to all states. This approach argued in favour of a wide and expansive exception to indefeasibility, and when combined with a legislative rule that the registration and appearance of an easement on the dominant title, even if absent on the burdened title, is conclusive evidence of the existence of this easement, will lead to an outcome that is justified in the interests of clarity, consistency, and coherence with what the original drafters of the Torrens legislation intended.[12] It is what is needed to avoid litigation of the ilk of *Castle Constructions* and *Howlin*. This approach is also consistent with history and precedent, with turn of the 20th century Victorian authority[13] providing further support for this course of action.

Given this context, this article will first outline the current law relating to the omitted easements exception to indefeasibility in Australia. The second part will briefly consider how the omitted easements exception came into existence, remembering of course that Sir Robert Torrens designed his land administration system with a passionate emphasis on the integrity of the system being aligned with the integrity of the register. Two decisions will then be examined, one emanating from New South Wales and its idiosyncratic view of when omitted easements are an exception, an approach seen as very narrow — this being *Castle Constructions* which ended in the High Court. This will be followed by a discussion of the energy-sapping Tasmanian matter of *Howlin*, which ultimately saw the first statutory easement created in 140 years imposed by reason of public interest, with this needed as the so-called wide exception for omitted easements in that state failed to deliver an outcome that many might have expected. This comparison will demonstrate that irrespective of whether the Parliament has passed a perceived broad approach to the recognition of unregistered or omitted easements, or one which is narrow, problems and confusion abound. This can only be overcome by a simplified approach, hopefully adopted nationally,[14] with this supporting the development of a national jurisprudence in this area which will further deliver clarity and consistency, as well as ensure that the results are not dictated by locale.

The importance of this cannot be underestimated. Property interests such as easements, while born out of the Industrial Revolution but with roots back to Roman times,[15] developed their summative legal principles at approximately

12 As noted in *Dobbie v Davidson* (1991) 23 NSWLR 625 ('*Dobbie*'), three approaches are possible in terms of interpreting the omitted easements exception to indefeasibility. One could do a textual approach based on the wording in the legislation, another is to consider the case law that has evolved, and there is also an historical examination. See the judgment beginning at 636 (Priestley JA). It is considered that the historical examination is most appropriate as it strips back the thinking and allows a re-examination from first principles and what was intended by the introduction of this exception.

13 *Webster v Strong* (1926) VLR 509; *Stevenson v James* (1889) 15 VLR 615; *Re Transfer of Land Statute and Application of Byrne; Ex parte Metropolitan Permanent Building and Investment Society* (1884) 10 VLR (L) 631.

14 For a discussion of this issue, see Tina Hunter, 'Uniform Torrens Title legislation: Is there a will and a way?' (2010) 18 *Australian Property Law Journal* 201.

15 For a discussion of the history associated with the evolution of easements, see Paul T Babie, 'How Property Law Shapes our Landscapes' (2012) 38 *Monash University Law Review* 1,

the same time as the establishment of the Torrens system.[16] Given this, it is not surprising that easements were not seen as a central concern in the establishment of the Torrens system. Today we know that incorporeal hereditaments of this nature shape the relationship that we have with our neighbours and the community in which we live. These rights will often provide the only means of access to land, and will almost certainly make the land more livable and hospitable, allowing persons to live in harmony with a shared purpose. To allow a system to remain embedding complexity and confusion only demeans property and its 'fundamental and pervasive social practice'.[17]

The current law of omitted easements

The current law demonstrates a number of divergent approaches, each with distinctive differences. Victoria and Western Australia have the broadest exception to indefeasibility, with the exception in Victoria being for any easement howsoever acquired subsisting over, upon or affecting the land.[18] Western Australia is to a very similar effect.[19]

Tasmania's similarly moves in a direction of a wide understanding as to when easements are an exception to indefeasibility. The wording, somewhat complex, is as follows:

> (e) [there is an exception to indefeasibility], so far as regards —
>
> (i) an easement arising by implication or under a statute which would have given rise to a legal interest if the servient land had not been registered land; or
>
> (ia) an easement created by deed but unintentionally omitted from the folio of the Register for the servient land when that servient land was brought under this Act or the repealed Act; or
>
> (ib) an easement that has been created under this Act but unintentionally omitted from the folio of the Register for the servient land; or
>
> (ii) an equitable easement, except as against a bona fide purchaser for value without notice of the easement who has lodged a transfer for registration;[20]

Legislation in the other states and territories is phrased more narrowly. Queensland and the Northern Territory[21] have sought to resolve the issue somewhat by providing a definition of what 'omission' means. For example in

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6–9; Lyria Bennett Moses and Cathy S Sherry, 'Unregistered Access: *Wheeldon v Burrows* Easements and Easements by Prescription over Torrens Land' (2007) 81 *Australian Law Journal* 491.

16 Brendan Edgeworth, *Butt's Land Law* (Lawbook Co, 7th ed, 2017) [9.50]: 'many of [easements] salient features were not settled until the mid-19th century'. The first Torrens legislation was *Real Property Act 1858* (SA), which commenced on 1 July 1858.

17 Humbach, above n 3, 211.

18 *Transfer of Land Act 1958* (Vic) s 42(2)(d).

19 *Transfer of Land Act 1893* (WA) s 68(1A).

> (1A) Despite subsection (1), the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to ... any easements acquired by enjoyment or user or subsisting over or upon or affecting such land ...

20 *Land Titles Act 1980* (Tas) s 40(3)(e).

21 See *Land Title Act 2000* (NT) s 189:

> (3) For the purposes of subsection (1)(c), an easement is taken to have been omitted if:

Queensland, there is an exception of an interest of a person if the particulars of the easement have been omitted from the register, with omission defined as follows:

> (3) For subsection (1)(c), the particulars of an easement (the '*easement particulars*') are taken to have been omitted from the freehold land register only if —
>
> (a) the easement was in existence when the lot burdened by it was first registered, but the easement particulars have never been recorded in the freehold land register against the lot; or
>
> (b) the easement particulars have previously been recorded in the freehold land register, but the current particulars in the freehold land register about the lot do not include the easement particulars, other than because the easement has been extinguished in relation to the lot; or
>
> (c) the instrument providing for the easement was lodged for registration but, because of an error of the registrar, has never been registered.[22]

In the remaining jurisdictions, where the word 'omission' is not defined, the substantive provision providing for the protection of the omitted easement is largely the same — the unregistered interest will not be defeated by indefeasibility where it is not described, omitted, or misdescribed from the register.[23] This is somewhat mirrored in South Australia.[24] New South Wales is somewhat distinctive with its two limbs, which, as will be shown, have been interpreted in contrasting ways.

> (a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act [the first limb] or validly created at or after that time under this or any other Act or a Commonwealth Act [the second limb].[25]

> (a) the easement was in existence when the lot burdened by it was first registered but particulars are no longer recorded in the land register against the lot burdened; or
>
> (b) the easement was registered but later omitted by an error of the Registrar-General.

22 *Land Title Act 1994* (Qld) s 185(1C).

23 Eg, in the Australian Capital Territory, the word omission is not used: The Australian Capital Territory similarly has a broad view (*Land Titles Act 1925* (ACT) s 58(1)(b)):

> (1) [A] person becoming registered as proprietor of land or of any interest in land under this Act shall, except in case of fraud, hold the land or interest, subject to such interests as are notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other interests whatsoever except as to — ...
>
> (b) any right of way or other easement created in or existing upon the same land which is not described, or is misdescribed in the relative certificate of title; ...

24 *Real Property Act 1886* (SA) s 69:

> The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the certificate of title of such land, be absolute and indefeasible, subject only to the following qualifications: ...
>
> (d) Omission of easement
> where a right-of-way or other easement not barred or avoided by the provisions of the *Rights-of-Way Act 1881* or of this Act, has been omitted or mis-described in any certificate, or other instrument of title: In which case such right-of-way or other easement shall prevail, but subject to the provisions of the said *Rights-of-Way Act 1881* and of this Act; ...

25 *Real Property Act 1900* (NSW) s 42(1)(a1).

The questions are, what does one make of the morass of this legislation, and can an overarching position for all Australian jurisdictions be reached? It seems clear that where the easement is created prior to the land becoming registered Torrens land, the easement is protected throughout the states and territories;[26] though in South Australia, this would only apply where the easement is created prior to the now repealed *Rights-of-Way Act 1881* (SA).[27] Far more problematic is where the easement is created at some time subsequent to the servient tenement becoming part of the Torrens register, but which for reasons which are most likely lost in the mists of time, no longer appears on the title of the servient tenement. It is this area where the litigation has occurred, at present as well as in the past.[28] This legislative quagmire also provides, as Burns notes, in the context of implied easements, a singularly one-dimensional analysis.[29] The question being asked is whether easements, and if so, what easements, should be an exception to indefeasibility.

> The one-dimensional analysis has had a peculiar effect. Tasmania simply relies on the policy of the general law (legislatively modified) ... Victoria, Western Australia and the ACT similarly does so.
>
> The three narrower approaches demonstrated in NSW (and generally Queensland and the Northern Territory) ... are arguably no better. When an implied easement arises before land is transferred to the Torrens system, then the easement is considered to be an omitted easement, determined by reference solely to the general law without any analysis of whether such an easement is relevant to modern conditions.[30]

In endorsing this view, what I would suggest is that the approach taken today in determining what the national framework should be for the omitted easements exception needs to be based on two factors — the historical provenance of where we came from, what was intended by the introduction of this exception, and the normative integrity of the Torrens system. Where do we come from informs where we are going. If these points are kept in mind, then the argument for legislative adjustment and clarification is overwhelming.

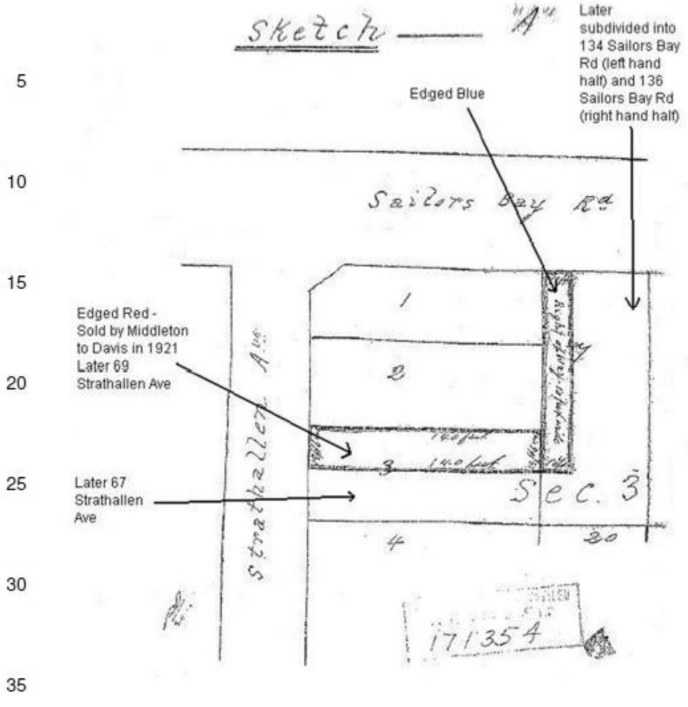
The decision in *Castle Constructions*[31]

The facts of this case were relatively simple. Textually, they can be described as follows: In 1921, a Mr Davis was the transferee of 134 Sailors Bay Road, Sydney. An easement was created over this parcel in favour of adjacent land at 69 Strathallan Avenue. This easement gave the Strathallan Land access over the parcel at 134 Sailors Bay Road to Sailors Bay Road itself. We now move forward to the turn of the millennium and the current owners of the Strathallan

26 *James v Registrar-General* [1968] 1 NSWR 310; *Rock v Todeschino* [1983] 1 Qd R 356.
27 *Lean v Maurice* (1874) 8 SALR 119.
28 For past examples, see *Nelson v Hughes* [1947] VLR 227; *Di Masi v Piromalli* [1980] WAR 57.
29 Fiona Burns, 'Implied Easements and the Integrity of the Torrens System' (2009) 21(2) *Bond Law Review* 1, 21.
30 Ibid.
31 An exceptional summary of the case can be located at Jennifer Stuckey-Clarke, 'Removal of Easements and the Exception to Indefeasibility: *Castle Constructions v Sahab Holdings*' (2013) 87 *Australian Law Journal* 581.

Land are Mr and Mrs Howard. Castle Constructions owns 134 Sailors Bay Road. Castle sought to have the easement expunged on the basis that the original easement was only ever intended to give Davis a personal right to use the access route. Pursuant to the legislation, the Howards were informed and did not seek to object to the removal of the easement. The Registrar-General removed the easement. Some 7 years later, the respondents to the High Court matter, Sahab Holdings Pty Ltd, now owns the Strathallan Land. Sahab Holdings seeks to have the easement reinstated, with this denied by the Registrar-General.

Descriptively,[32] the land can be represented as such:



Sahab then sought a declaration in the Supreme Court of New South Wales for an order to restore the easement. At first instance they were unsuccessful,[33] with this reversed by the Court of Appeal. The High Court then overturned the decision of the Court of Appeal. Castle Constructions won.

32 *Sahab Holdings Pty Ltd v Registrar-General* (2011) 15 BPR 29,627, 29,633 [3].
33 *Sahab Holdings Pty Ltd v Registrar-General [No 2]* (2010) 14 BPR 27,459.

Court of Appeal[34]

The Court of Appeal, in interpreting the aforesaid NSW legislation, applied the earlier decision of the same court in *Dobbie v Davidson*.[35] 'Omission' merely meant something 'left out' or 'not there'. Accordingly, it did not matter where the omission related to an easement that existed before the land was brought under the Torrens legislation (the first limb of this section), or validly created after that time (the second limb). Whereas *Dobbie v Davidson* had involved the construction of the first limb of s 41(1)(a1), and *Castle Constructions* involved the second limb, the 'legislative history of the exception embodied [in the legislation] and a mandated literal construction of the section itself'[36] led to the result in favour of Sahab. The Registrar-General had the legislative power to correct the title and restore the easement and had failed to do so. Critically, and specifically in terms of how the High Court came to a different conclusion, indefeasibility did not pose an obstacle as the omitted easements exception was legislatively carved away from this notion of paramountcy. It is worth citing the relevant paragraph from the Court of Appeal's judgment in full.[37]

> One difficulty facing Castle's reliance on the concept of indefeasibility is that the right of way burdened its title when its interest in 134 Sailors Bay was first registered in 2001. There was no relevant defect in its title that was cured by Castle becoming registered proprietor of ... Sailors Bay. It was only after it became registered that it made the 2001 Request to the Registrar-General to delete the right of way from its title. This was done in that the Registrar-General removed, cancelled or expunged (it matters not) the recording of the right of way from the relevant folios of the Register. But this was due to the act ... of Castle as registered proprietor of the relevant land. The correction of the Register now to reinstate Castle's title to what it was at the time its interest in 134 Sailors Bay was registered (burdened as it was by the right of way) does not involve the setting aside of Castle's title at the time it became indefeasible: rather it confirms the state of its title at that time.[38]

The High Court[39]

Without any disagreement as to the underlying facts, the High Court held against Sahab and found in favour of Castle Constructions. Perhaps reflecting the orthodoxy that each issuance of a certificate of title involves the relinquishment of the previous title and the grant from the Crown of a new title,[40] *Dobbie* was distinguishable. This case was not relevant as this decision was based on the first limb of the New South Wales' omitted easements exception, the first limb rightly dealt with a case where the easement was 'not there', or had been 'left out'. But this was not the case when the easement related to the second limb of s 42(1)(a1).

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34 *Sahab Holdings Pty Ltd v Registrar-General* (2011) 15 BPR 29, 627.
35 (1991) 23 NSWLR 625 ('*Dobbie*').
36 Stuckey-Clarke, above n 31, 583.
37 *Sahab Holdings Pty Ltd v Registrar-General* (2011) 15 BPR 29, 627, 29,679 [244].
38 Ibid.
39 *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149.
40 Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [2003].

> Other considerations intrude when an easement created under the RPA by registration of a dealing has later been removed by the Registrar-General. When an easement has been previously recorded on the Register, but is no longer recorded because it has been deliberately removed from the Register, it could be said that the easement was 'not there'. It is more accurate, however, to say that the easement is 'no longer there because it has been removed'. The significance to be given to the fact of the easement's removal from the Register requires attention to fundamental principles. The relevant exception to the paramountcy of the registered proprietor's title is 'in the case of the omission' of an easement (where the hypothesis is that the easement continues to exist but is not recorded). Because the RPA provided for title by registration, the deliberate removal from the Register of an easement created by registration cannot be treated as a 'case of the omission ... of an easement' for the purposes of s 42(1)(a1). The presupposition for the operation of s 42(1)(a1) that the easement continues to exist, is not valid. The easement has been removed from the Register.[41]

Stuckey-Clarke cogently criticises the decision as an attack on the credibility of the Torrens system. In her view, '[t]he "fundamental principle" of indefeasibility has been applied to effect arbitrary consequences which are not in the interests of justice.'[42] And it is suggested that this is very much at the heart of the argument. Should the integrity of the Torrens system be aligned simply with the integrity of the register, or are there more overarching ideas in play? If the answer here is that the register is the system, then the High Court decision has much to be commended for. When Sahab purchased their land, there was no easement attached to that title, and they knew that upon purchase, the easement had been cancelled some 6 years earlier.[43] The current certificate of title showed no easement, and with Torrens land eschewing any derivative recognition of past interests in the land, the easement could not be regained. They had willingly bought the title without the easement, and were arguably seeking to gain a windfall advantage that would come from the additional access that it would give. But if the integrity of the Torrens system is wider than simply the integrity of the register, then the decision of the NSW Court of Appeal is to be preferred. There had been an easement on this land which had been intentionally removed in circumstances where this should not have occurred.[44] All that was being done by allowing the easement to be reinserted back onto the register was restoring the title to the land as it should

41 *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149, 160–1 [25] (emphasis omitted). It should be noted that Sahab subsequently went back before the High Court to reargue the matter. This was rejected as the Court saw this as an attempt to litigate issues that had already been resolved. *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd [No 2]* (2013) 303 ALR 84, 89 [26]:

> The matters advanced by Sahab in the affidavits of its solicitor and in its written submissions demonstrate no *arguable* case that this Court misapprehended any question of fact or law. Nor do the affidavits or the written submissions show that Sahab now seeks to advance arguments which it did not advance at the original hearing. All that is shown is that Sahab disagrees with the conclusions reached by this Court and that it seeks a second opportunity to persuade the Court that the view of the construction and application of the relevant provisions of the RPA articulated by the solicitor for Sahab is preferable to the view formed by the Court. That should not be permitted.

42 Stuckey-Clarke, above n 31, 585.

43 *Sahab Holdings Pty Ltd v Registrar-General [No 2]* (2010) 14 BPR 27,459, 27,467 [46].

44 Ibid 27,464 [29]:

have been. Perhaps this was a unique interpretation of the narrow NSW legislation, though as we will see in the saga of the Tasmanian *Howlin* litigation, even a wider understanding of the omitted easements exception can fail to assist. The problem, it is suggested, is in the unique nature of the legislation of each state and the failure of a national understanding and jurisprudence in the Australian law of easements.

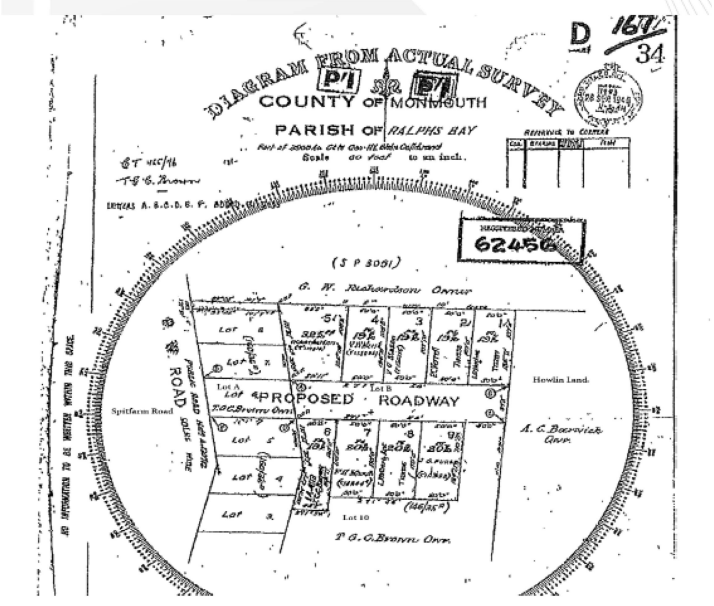
The 10-year litigation in *Howlin*

The 10-year saga of this litigation, of which omitted easements is only a part, arose out of an attempt by an owner of land to subdivide part of the property owned by him and family members.[45] To enable subdivision of the Howlin land as shown on the diagram below, the owner first sought in respect of what is shown on the illustration as a 'proposed roadway', and which is commonly known as Marsh Street, an order that that roadway be recognised as a public highway. When this was refused, it led ultimately to the current litigation whereby the owners of the lots on either side of the proposed roadway sought a guarantee of access from Spitfarm Road, over and through the disputed land bordering that road (shown as Lot A on the diagram).[46] These owners of the land adjoining Marsh Street claimed to be entitled to an easement over Lot A, and while some of their titles showed the existence of an easement, the title to Lot A (the supposed servient tenement) did not evidence any burden. Simply said, indefeasibility was a barrier to recognition of an easement, unless the omitted easements exception, or some other basis, could be used to support the existence of an easement.

In summary, properly construed the Middleton transfer created a permanent right of way over the land, which is now 134 Sailors Bay [Road]. The rights conferred on the registered proprietor of 69 Strathallan [Avenue] did not end when Mr Davis ceased to be its registered proprietor.

45 For a full list of the litigation, see *Howlin* (2016) 219 LGERA 226, 235–6 [24]–[25]. It exceeds 10 decisions, including matters before the Resource Management and Planning Appeal Tribunal, the Tasmanian Supreme Court, the Appellate Court of Tasmania and an application to the High Court where special leave to appeal was refused.

46 Survey diagram attached to the judgment in *Howlin* (2016) 219 LGERA 226, 231 [3].



The decision of Pearce J

In what ultimately was a historic decision, evoking for the first time the use of s 84J of the *Conveyancing and Law of Property Act 1884* (Tas) which allows the imposition of a statutory easement, the reasoning began with an appeal to the core aspect of the Torrens system. It is a system of registration of title, and his Honour, in quoting from the High Court in *Queensland Premier Mines Pty Ltd v French*, noted that:

> One of the fundamental purposes of the Torrens system ... is to give effect to an important public policy. That policy is that the land title register should be sufficient of itself to inform those concerned about the nature and extent of any outstanding interest in relation to the land.[47]

The easements exception to indefeasibility in the Tasmanian legislation is rather convoluted in its language and form, with this largely a result of the previous High Court decision in *Parramore v Duggan*.[48] This earlier High Court decision was based on the wording of the Tasmanian omitted easements exception that only contained paras (i) and (ii) of the previously cited legislation. In this case, an express easement had been granted over the servient land when the land was held under the general law system of registration. Subsequently, both the dominant and servient tenements were converted to Torrens title, with the dominant title showing the benefit of the easement, and the servient title not. At both the trial judge and the appellate

47 (2007) 235 CLR 81, 90 [14] (Pearce J).
48 (1995) 183 CLR 633.

level in Tasmania,[49] the decision was in favour of the dominant tenement owners. The easement had been omitted and was covered by this provision, the Tasmanian courts suggesting that to make sense of the provision, the word 'or', as noted in italics, had to be read into the legislation:

> (i) an easement arising by implication or under a statute [*or*] which would have given rise to a legal interest if the servient land had not been registered land[50]

Perhaps not surprisingly, given the reluctance of courts to introduce additional words into the statute, the High Court strongly rebuked the Tasmanian courts. The decision was unanimously in favour of the servient tenement, though as Butt notes:

> [O]ne cannot help the sneaking suspicion that the drafter's pen slipped, and that 'or' was inadvertently omitted from the text of the Bill This appears from the Minister's speech introducing the Bill: 'to declare the present law as interpreted by the courts'. The three categories of exception envisaged by the Tasmanian judges [easements by implication, easements under a statute, and easements giving rise to a legal interest if the land was not Torrens land] in fact reflect what the courts have seen as the general legislative approach to 'omitted' easements ever since the Torrens system was first introduced ...[51]

With this background in mind, Pearce J in *Howlin* accepted that the easement had been unintentionally omitted from the folio of the register, with this clear from the terms of the transfer and the existence of the easement on the dominant tenements. As to why they were not recorded on the dominant tenements, no explanation was possible. At the time of registration, the Recorder of Titles had no obligation to enter a memorial of the instrument creating the easement on the servient tenement, a practice which is different today.[52]

Despite this recognition of unintentional omission, the legislation did not assist. Section 40(3)(ia) was undoubtedly introduced post-*Parramore v Duggan*, and designed to address the problems highlighted in that case, which involved an easement being created over servient land and then omitted from the title of the servient land once the land is registered

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49 *Duggan v Parramore* (1993) 2 Tas R 442; *Parramore v Duggan* (1994) 4 Tas R 64.

50 *Land Titles Act 1980* (Tas) s 40(3)(i).

51 Peter Butt, 'Conveyancing' (1996) 70 *Australian Law Journal* 345, 347 (citation omitted).

52 *Howlin* (2016) 219 LGERA 226, 251–2 [83]. *Land Titles Act 1980* (Tas) s 105(3) provides:

> (3) The Recorder, when registering a memorandum of transfer or lease which grants or reserves an easement, shall record the grant or reservation upon —
>
> (a) the folio of the Register, or the registered lease, evidencing title to the land burdened by the easement; and
>
> (b) there the land benefited by the easement is registered land, the folio of the Register or the registered lease which evidences title to the land benefited.

When looking at a schedule of easements, created pursuant to a subdivision, eg, Local Government (Building and Miscellaneous Provisions) Act 1993 (Tas) s 99(1)(c) provides, though note that it is expressed in the permissive:

> (c) the Recorder of Titles may notify the existence of the easement, profit a prendre or covenant on the folio in respect of land —
>
> (i) benefited by any easement or profit a prendre; or
>
> (ii) burdened by any easement, profit a prendre or covenant.

under the Torrens system.[53] It did not apply in this scenario because the land was already under the Torrens system, and there is no clear explanation as to the absence of the notation on the servient land.[54]

Pearce J, presumably dissatisfied with this outcome, and as noted, in a first for Tasmania, used s 84J of the *Conveyancing and Law of Property Act 1884* to establish a statutory easement in favour of the plaintiff landowners. While equivalent provisions are commonly used in other jurisdictions,[55] it is possible that the reduced urban density of Tasmania, the cheaper availability of housing, the lesser use of strata titles, and a wider exception for omitted easements have meant that calls for its use has been rarely made.

Section 84J(1) of the *Conveyancing and Law of Property Act 1884* (Tas) provides:

> Subject to this section, where the Supreme Court is satisfied that to facilitate the reasonable user of any land (in this section referred to as 'the dominant land') for some public or private purpose it is consistent with the public interest that a statutory right of user should be created over other land (in this section referred to as 'the servient land') it may, by order, impose upon the servient land, or on the owner for the time being thereof, an obligation of user or an obligation to permit the user of that land in accordance with the order.

The Tasmanian Court did note that the use of this legislation had to be approached with significant caution, involving as it does, a reordering of registered property rights.[56] But with this cautionary note in mind, his Honour held that the legislative requirements had been amply met. With reference to the use of the land for residential purposes; the geography of the area; the orientation of the houses; the well-utilised gravel road; the use of council of vehicles and other utility providers; the existence of service poles for electricity and telecommunications; and the establishment of a sign denoting Marsh Street, the indications were there that the imposition of an easement was not only a reasonable use of the land, but also that it was consistent with the public interest.[57] But this alone did not answer the inquiry. Regard had to be had to the consequences of imposing such an order, and the discretion to be exercised by a decision-maker was only permissive, even if the criteria had been met.[58] In this matter, however, the discretion was to be exercised in favour the dominant owners.

While the plaintiffs were ultimately successful in establishing an easement, in the view of this author, the process was at best unwieldy, and at worst, expensive, stressful, and fraught with the possibility that success would not eventuate. It sends a very cautionary message to any conveyancer acting for

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53 *Howlin* (2016) 219 LGERA 226, 252–3 [84].

54 It should also be noted that the equitable easements exception to indefeasibility was unavailable as well, see *Howlin* (2016) 219 LGERA 226, 256–7 [96]–[97].

55 For an exceptional account of the issues in this area, see the work of Scott Grattan, 'Proprietarian Conceptions of Statutory Access Rights', in Elizabeth Cooke (ed), *Modern Studies of Property Law* (Hart Publishing, 2003) vol 2, 353–74; Scott Grattan, 'The name(s) of the rose: personality, preferences and court-imposed easements' (2004) 10 *Canterbury Law Review* 329.

56 *Howlin* (2016) 219 LGERA 226, 259 [108].

57 Ibid 260–1 [109]–[110].

58 Ibid 261 [113].

a purchaser. Given Torrens wanted a system that was non-derivative, and required no searching beyond the current state of the title in question, the consequence of decisions such as *Howlin* and *Castle Constructions* that appear to require title searching of nearby properties, appears incongruous at best. It is simply impossible to know how many titles are affected in the way demonstrated in *Howlin*, and while past practices are not replicated today, is it 'safe for lawyers or conveyancers, acting on a purchase or mortgage of land, to search only the title to the land being purchased or mortgaged'.[59]

Developing a new solution

As to what solution should be adopted, there are, as noted in *Dobbie v Davidson*[60] three possible theoretical approaches. Our lens could be textual, and literally analyse the legislative frameworks to ascertain the correct approach. Or, the search for linguistic meaning could be purposive with this informed by the cases. But neither of these will consider the matter from first principles or from the genesis of the legislation, or indeed have a national perspective. It is this to which we must look. Any failure to do this will only perpetuate the state-based, idiosyncratic understanding of what we are trying to achieve. It is through this examination of the basal elements of what was intended, (that is, where the law has come from) that we can judge how complicated the omitted easements exception has become and why a fresh approach is now needed (where the law on easements should be heading).

When starting from first principles, one, of course, begins from the mysticism of indefeasibility.

> The enduring issue in Torrens title jurisprudence and analysis — the question 'which has transcended all others', according to the great Torrens scholar Professor Douglas Whalan — is as to when 'the magical protective armour of indefeasibility' is 'donned' by a title. That it was 'magical' was its key sales pitch. How magical, however, was — and is — the question.[61]

In answering this issue as to how magical it was, we know that omitted easements were an exception from the very first legislative incarnation, and it was very widely drafted, with indefeasibility simply qualified by the 'omission or misdescription of any right-of-way or other easement'.[62] The word 'omission' was not to be qualified in any way.[63] The historical documents of the time evidencing a view that access or a right of way that had previously existed before the operation of what was to become known as the Torrens system was not to be lost by the magic of indefeasibility.[64] As to why this occurred, we can only speculate, but it is more than likely that the surveying difficulties that were present in the new colony of South Australia,[65] the need to ensure the success of the momentous land reform project that saw

59 Peter Butt, 'Conveyancing and property' (2016) 90 *Australian Law Journal* 217, 219.
60 (1991) 23 NSWLR 625.
61 Rosalind Croucher, '150 years of Torrens — Too much, too little, too soon, too late?' (2009) 31 *Australian Bar Review* 245, 261.
62 *Dobbie v Davidson* (1991) 23 NSWLR 625, 649.
63 Ibid 655.
64 Ibid 651.
65 Croucher, above n 61, 263.

Robert Torrens top the electoral poll in 1857 with his campaign built squarely on the transformation of land law's core principles,[66] drove Torrens to concede this exception in the original legislation,[67] even though his original text[68] explaining his law reform project makes no reference to easements whatsoever — perhaps not surprising given as previously noted, the doctrinal knowledge of easements was being developed in the common law courts of England at around the same time as the introduction of the Torrens legislation.

If time had stood still, and all jurisdictions had adopted a similar wording, perhaps the aforesaid cases would never have occurred. But of course, what we have seen, with federation undoubtedly contributing to the imbroglio that we now have, is the evolution of different circumstances and different responses designed to address perceived shortcomings at a particular time — the changes made in Tasmania post-*Parramore v Duggan*[69] emblematic of that. The confusion surrounding, or perhaps more accurately, the lack of importance given to the topic of omitted easements also shown by the range of responses in those jurisdictions that contemplated Torrens title.[70] When Peter Butt expressed (or perhaps bemoaned) in 1987 about 'Yet Another Omitted Easement',[71] he may have legitimately thought that 30 years hence we might have come to a national jurisprudence as to when the pedestal of indefeasibility is to be weakened by a right of way that is on the title of the dominant tenement but is missing from the title of the servient landowner. Sadly, that has not occurred.

In terms of solutions, we could leave things as they are, and impose litigants such as Sahab and the plaintiffs in *Howlin* to long, stressful and expensive litigations, but that seems to achieve littler other than to encourage the use of court-imposed easements as a way to ameliorate or soften the harshness of the legislative exception as interpreted by the judicial system. These statutory easements do have the capacity to make a practical resolution to an issue around access, but a:

> newly registered putative dominant owner would be in a difficult position. She would have no immediate rights in the servient tenement; and she would have to initiate costly and lengthy litigation to acquire an easement, without guaranteed success.[72]

Accordingly, the solution that I suggest here is somewhat simpler. It starts from a perspective that while the integrity of the register is a critical component of the Torrens system, today our first principles examination must talk in terms of the integrity of the system.[73] This encompasses not only the

66 *Dobbie* (1991) 23 NSWLR 625, 648.
67 Ibid 650.
68 Robert R Torrens, 'The South Australian System of Conveyancing by Registration of Title' [1859] *Australian Colonial Law Monographs*.
69 (1995) 183 CLR 633.
70 As Burns, above n 29, 6 n 35 notes, in looking at the US jurisdictions that considered Torrens title, some left out any consideration of easements as an exception, others had a widely drafted exception, whereas others put a temporal constraint on when they would be an exception to indefeasibility.
71 Peter Butt, 'The Conveyancer' (1987) 61 *Australian Law Journal* 660, 660–2.
72 Burns, above n 29, 24.
73 As Burns, above n 29, 25 notes: 'In the future, the integrity of the Torrens system will not

magic of indefeasibility but also the recognition that legislation exceptions, common law incursions, and overriding legislation will continue to mould and shape the character and context of indefeasibility — as it always has done. Rather than viewing these incursions as undermining the concept, it is time that a common structure is sought across the states and territories, based on how it was originally understood, and in line with what a functioning land administration system must do in matching or aligning with community expectations. We learn from where we originated to determine where we are going.

The solution is twofold. First, we need to adopt a broad recognition of what was intended by the omissions exception to indefeasibility and the suggestion made is that we adopt what was proposed by the Victorian Law Reform Commission in 2010.[74] The second element is that each state and territory include a provision, with this already existing in some, that would see the registration of the benefit of an easement on the dominant tenement as conclusive evidence that such an easement exists. It is the combination of these aspects that are critical. The wide exception to indefeasibility and the conclusive evidence provision, as interpreted by the early cases[75] in this area, provide the historical support on which we can case our normative understanding.[76]

The Victorian Law Reform Commission proposals

The suggestions made by the Victorian Law Reform Commission were to the effect that a registered title would be subject to:

> any easements howsoever acquired before a specified date, and the following easements that are created or arise after a specified date:
>
> (a) created or implied by statute or by common law;
> (b) easements at any time omitted from, or misdescribed in, the register.[77]

Noting that difficult issues arise in relation to omitted easements, the Commission rejected the view of the Law Institute of Victoria that would see omitted and misdescribed easements as unenforceable against subsequent servient owners.[78] The importance of rights of use that dominant owners rely upon, and to move towards consistency with other states, dictated that a wide exception was mandated.[79]

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only require the accuracy of the register, but also a broader utility — a responsiveness to those situations in which parties inadvertently and innocently fail to protect their interests.'

74 Victorian Law Reform Commission, above n 11.

75 These cases include *Webster v Strong* (1926) VLR 509; *Stevenson v James* (1889) 15 VLR 615, 624; *Re Transfer of Land Statute and Application of Byrne; Ex parte Metropolitan Permanent Building and Investment Society* (1884) 10 VLR (L) 631, 366.

76 Additional statutory provisions which would assist the machinery of this would include a capacity in the registrar to correct errors in the Register, (for *Real Property Act 1900* (NSW) ss 12(1)(d)–(d1); *Transfer of Land Act 1958* (Vic) s 103(2)(a); *Land Title Act 1994* (Qld) s 15(1)(a); *Real Property Act 1886* (SA) s 220(f); *Transfer of Land Act 1893* (WA) ss 188(1)–(3), 189(1); *Land Titles Act 1980* (Tas) s 139(1); *Land Titles Act 1925* (ACT) ss 14(1)(e), 160; *Land Title Act* (NT) s 17(1).

77 Victorian Law Reform Commission, above n 11.

78 Ibid 61 [4.134].

79 Ibid [4.135]–[4.136].

The implementation of such a move is also consistent, as noted with what was stated in the original legislation, but more importantly, satisfies a contemporary need today where the rise of smaller, more dense living areas, means that people's wellbeing and relationship to their land is dependent on the relationship and behaviour of those that live close by.[80]

The register as evidence of easements

To ensure a common national understanding of when the omitted easement exception would apply, the second suggestion is that each state introduce a provision that would provide that registration on the dominant tenement that the easement exists is conclusive evidence of such a right. Provisions of this nature already exist, with, for example, Western Australia reading as follows:

> Whenever any certificate of title either already registered or issued or hereafter to be registered or issued under any of the provisions or otherwise under the operation of this Act shall contain any statement to the effect that the person named in the certificate is entitled to any easement therein specified such statement shall be received in all courts of law and equity as conclusive evidence that he is so entitled.[81]

Tasmania,[82] South Australia,[83] and the Australian Capital Territory[84] contain similar provisions as to the effect of the easement, with the remaining states and territories only appearing to have broad provisions about the conclusiveness of the register.[85] The specialist provisions were the subject of comment by Toohey J in *Parramore v Duggan* where his Honour suggested that in the context of s 106 of the Tasmanian *Land Titles Act 1980*:

> [The conclusiveness of the easement being noted on the dominant tenement must be linked with indefeasibility] which lists those circumstances in which the title of a registered proprietor is not indefeasible ... Section 106(1) is an evidentiary provision. It prevents a collateral attack upon the existence of an easement to which

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80 On an allied topic, this is explicitly recognised in the *Strata Titles Act 1998* (Tas) s 91(3). By-laws in strata schemes are invalid if they are unreasonable, or if they can affect the health, welfare or safety of an individual.

81 *Transfer of Land Act 1893* (WA) s 64.

82 *Land Titles Act 1980* (Tas) s 106(1):

> (1) Subject to subsection (2), a statement in a folio of the Register to the effect that the land comprised in the folio has the benefit of an easement shall be conclusive evidence that the land has that benefit.

83 *Real Property Act 1886* s 87:

> Every certificate issued before the eighteenth day of November, 1881, containing therein a statement to the effect that the registered proprietor is seized of the land therein described, subject to or together with any right-of-way therein described or delineated, or together with any easement therein described, shall be deemed to operate as a grant or reservation, as the case may be, of such right-of-way or other easement, and such certificate shall, except in the case of fraud, be received in all Courts as conclusive evidence of the existence of such right-of-way or other easement ...

84 *Land Titles Act 1925* (ACT) s 53(4):

> Where any grant or certificate of title contains a statement to the effect that the person named therein is entitled to any easement therein specified, the statement shall be conclusive evidence that he or she is so entitled.

85 See *Real Property Act 1900* (NSW) s 40; *Transfer of Land Act 1958* (Vic) s 41; *Land Title Act 1994* (Qld) ss 46, 179; *Land Title Act* (NT) ss 47, 182.

> the title refers. But it does not preclude reliance upon any other provision of the Act which confers indefeasibility of title upon the registered proprietor of servient land free from the easement ... Section 106(1) would give force to the respondent's claim in the absence of any such provision or where there was a provision which made all easements exceptions to the indefeasibility provided by the Act as was the position in a number of Victorian cases.[86]

While it is difficult to know what was meant by collateral attack[87] by his Honour, with no previous nor subsequent case seeming to address this, the importance of what his Honour says is that reliance on common law authority where the registration of the easement on the dominant tenement was conclusive evidence of its existence (in the literal meaning of this) can be had where the legislative provision is drafted widely. In suggesting this, it is important to note the early Victorian authority[88] supports this conclusion. For example in *Webster v Strong*,[89] the plaintiff was entitled to a right of carriage way over adjoining land, with this noted on his certificate of title. The servient tenement's certificate made no specific mention of this right of carriage way. The evidence established that for many years, the dominant owner, and the predecessors in title had used the access only as a footway, or for the ingress and egress of carriages that could fit through a 4-foot wide access, and not for the passage of carriages wider than this. There had been acquiescence in its use only as a footway or limited access way, with this sufficient to constitute common law abandonment of the easement. The common law principles were, however, subjugated to the conclusiveness of the register. While it remained on the dominant owner's title, it could be enforced, and evidence on the title of the dominant owner was conclusive of the easement's existence. Similarly, in *Stevenson v James*[90] the omission by the registrar to enter an easement on the servient owner's land did not relieve the servient owner of liability.

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86 (1995) 183 CLR 633, 643.

87 Speculating, it is suggested that his Honour was possibly considering how an easement could be defeated by some other means, such as an argument surrounding abandonment, release (express or implied), or by other grounds such as estoppel, even though the easement is still registered on title. This view is consistent with a number of the earliest cases considering the interaction between the 'conclusive evidence' provision and the exception to indefeasibility for omitted easements. Eg, in *Webster v Strong* (1926) VLR 509, the then *Transfer of Land Act 1915* (Vic) s 68 was clear that the certificate of title of the dominant tenement, when referencing an easement, was conclusive evidence that the person was entitled to that easement. In argument, it was indicated that common law evidence of abandonment could not be set up in derogation of the benefit of the easement, which was conclusively established by the certificate of title of the dominant owner: at 512. Another possibility is that grounds which operate beyond the confines of land law, such as restitutionary principles cannot be used to deny the benefit of the easement to the dominant owner (eg, the dominant owner would be unjustly enriched by the recognition of the easement burdening another person whose title does not evidence the easement).
A thank you is expressed to the Land Titles Office, Tasmania, for discussing ideas as to what is meant by a collateral attack.

88 *Webster v Strong* (1926) VLR 509; *Stevenson v James* (1889) 15 VLR 615, 624; *Re Transfer of Land Statute and Application of Byrne; Ex parte Metropolitan Permanent Building and Investment Society* (1884) 10 VLR (L) 631, 366.

89 (1926) VLR 509.

90 (1889) 15 VLR 615.

> If the plaintiffs, as owners of the dominant tenement, had obtained a statement in the certificate under this provision [the conclusive evidence provision], the certificate would be conclusive ...[91]

Bringing both elements together

The necessity for change is obvious. Litigation of the nature of *Castle Constructions* and *Howlin* serves no-one. And while legislative provisions today, and one suspects the practice of registrars, would be to record easements on both the dominant and servient tenements,[92] there is no way of knowing how many dominant tenements do not have the easement recorded on the corresponding servient tenement. As Butt asks:

> And would such an obligation [to search nearby titles] arise only if hinted at by something in the physical characteristics of the land being purchased or mortgaged? Or would it be absolute, regardless of the physical circumstances discoverable by on-site inspection?[93]

We are, as Brennan J commented in *Mabo v Queensland [No 2]*,[94] a 'prisoner of [our] history',[95] and the 'skeleton of principle'[96] that gives land law its internal consistency and coherency demands that it respond to the existence and prevalence of easements that may occur in practice, but are not seen to be registered on the servient land. The surveying mistakes of the past need not result in an undermining of the integrity of the Torrens system. As long ago as 1971 in the seminal authority of *Breskvar v Wall*, Barwick CJ commented on the regret associated with a lack of uniformity surrounding Torrens legislation;[97] and while our political masters may take a number of generations to garner the political will to address this, there is no doubt that given the importance of land in this country, as far as possible, we strive to achieve a common understanding of the core precepts, such as the exceptions to indefeasibility that influence Torrens jurisprudence.[98]

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91 Ibid 624.

92 Eg, *Land Title Act 1925* (ACT) s 103B; *Real Property Act 1900* (NSW) s 47; *Land Title Act 1994* (Qld) s 85A; *Real Property Act 1886* (SA) s 88; *Land Titles Act 1980* (Tas) s 15; *Transfer of Land Act 1958* (Vic) s 72; *Transfer of Land Act 1893* (WA) s 65A. I was not able to locate an equivalent provision in the Northern Territory, though see *Land Title Act 2000* (NT) s 91.

93 Peter Butt, 'Conveyancing and property' (2016) 90 *Australian Law Journal* 217, 219.

94 (1992) 175 CLR 1.

95 Ibid 29.

96 Ibid.

97 (1971) 126 CLR 376, 386.

98 See the comments by Kirby P, in *Dobbie* (1991) 23 NSWLR 625, 631:

> Whilst the absence of complete uniformity in Torrens legislation throughout Australia was described as a matter for regret by Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376 at 386, it is undesirable that courts in different parts of Australia should adopt, in respect of the meaning of such legislation, markedly different approaches, unless the different language of the local statute warrants a special and different approach to its meaning. Interests in land represent a major component of property interests in this country. For ordinary people, such interests normally represent their most valuable property rights. For business and commerce, interests in land are a valuable economic commodity. Sometimes, variations in the text of local legislation will necessitate a different interpretation even of the same words. But unless such variations are clearly

But of course, it must be noted that Sir Robert Torrens himself made no mention of easements in the historical work that now bears his name[99] — easements were something that was not even considered central to the core functions of the majesty of indefeasibility. But when the legislation began its journey, easements quickly gained special protection, and it is easy to understand way. Our land law system has been shaped, if not constructed, by the operation and acceptance of the doctrine of tenure. People were not to be seen as the absolute owners of land, rather, land was to be gotten hold of by the Crown, with the concept of seisin central to that. 'The principles of English real property law, with socage tenure as the basis, were introduced into the colony [of New South Wales] from the beginning — all lands of the territory lying in the grant of the Crown, and until granted forming a royal demesne.'[100] Litigated matters such as *Castle Constructions* and *Howlin* demonstrate why easements were to be protected. The notion of possession that was central to tenure, and a person with the longstanding benefit of an easement that was used to access the property, should not be denied the benefits despite its absence from the title. What decisions of this nature invoke is a requirement that not only should the title of the property being purchased be checked, but that titles to properties not even being bought should be investigated. One could only imagine what Sir Robert Torrens would think of such a development.[101] It is too late to reverse that trend, but what can be done is a coherence of national thinking as to how we can minimise the litigation surrounding omitted easements. The first development is to have a wide exception to indefeasibility in line with what was proposed by the Victorian Law Reform Commission. The second is for the legislative to establish a view that the easement appearing on the dominant tenement is conclusive evidence that the easement in fact exists. And third, a practice that easements are recorded on both the dominant and servient tenements. It will take time, effort and political will for this to occur, but if it is possible to get agreement on one small aspect, perhaps that can be the wedge that promotes a project to develop a truly national Torrens framework, something which has been 170 years in the making, and at least 118 years overdue. Our omission in relation to a national jurisprudence on easements is merely a symbol of our omission to achieve a national land administration system. We now have national corporate legislation,[102] national consumer legislation,[103] national legislation on personal properties,[104] yet the very thing that connects us with the planet remains fragmented and divided. Fixing the omitted exceptions is but a small step on a long journey, but it is a journey that must be begun.

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justified, there is much to be said for adopting a uniform approach to the construction of common basic provisions of the legislation ...

99 Torrens, above n 68 — a search of this text does not reveal that the word easement is ever used.

100 *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54, 71 (Windeyer J).

101 See similar comments made by Butt, 'The Conveyancer', above n 71, 661.

102 *Corporations Act 2001* (Cth).

103 *Competition and Consumer Act 2010* sch 2.

104 *Personal Property Securities Act 2009* (Cth).